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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 722-723

JOHN W. FRANK, ET AL.,

Petitioners,

vs.

WILSON & CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, John W. Frank, *et al.*, plaintiffs below, pray that a writ of certiorari issue to review a judgment of the Court of Appeals of the Seventh Circuit entered on February 10, 1949 reversing a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, and remanding the cause with instructions to dismiss the complaint.

Opinion Below.

The opinion of the Court of Appeals (T. 553-59) is reported at 172 Fed. (2) 712 (1949). The District Court did not write a formal opinion, but entered detailed Findings of Fact (T. 517-21) and Conclusions of Law (T. 522-26).

Jurisdiction of This Court.

The judgment of the Court of Appeals was entered February 10, 1949 (T. 560-61).

The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code.

Statement of the Matter Involved.

This cause is an action for unpaid overtime compensation and an additional equal amount as liquidated damages brought by petitioners, plaintiffs below, under the provisions of Sections 7 and 16(b) of the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C., §§ 207, 216(b). The defendant took appropriate action to assert defenses under the Portal-to-Portal Act, 61 Stat. 84, 29 U. S. C. § 251, which was enacted several months after this action was commenced. On the basis of detailed findings of fact (T. 517-21) and Conclusions of Law (T. 522-26), the Trial Court entered judgment for petitioners for the amount found to be due them for unpaid overtime compensation, but failed to award an additional equal amount as liquidated damages. There was no formal opinion. The respondent appealed from the judgment insofar as it awarded overtime compensation (T. 531-2), and petitioners filed a cross-appeal from the judgment insofar as it failed to award liquidated damages (T. 539-40). The Court of Appeals reversed the judgment for unpaid overtime compensation

and so had no occasion to consider petitioners' cross-appeal (T. 560-61).

The facts are correctly stated in the opinion of the Court of Appeals (T. 553-55), as follows:

> "Plaintiffs make claim for alleged unpaid overtime compensation under Sec. 16(b) of the Fair Labor Standards Act (52 Stat. 1060, 29 U. S. C., Sec. 200, *et seq.*), covering the period from July 15, 1941, to July 19, 1945. Judgment was entered in favor of 149 plaintiffs in the sum of $14,211.62, plus interest and costs, and $1,500.00 attorney's fee. The amounts awarded ranged from $5.05 to Harry J. Schumacher to $168.53 for Alvin Arzig; thirty-three plaintiffs were awarded less than $50.00 each; sixty-nine less than $100.00 each. Defendant appeals from the judgment entered.
>
> "The trial court refused to award liquidated damages, concluding that the defendant's failure to compensate the plaintiffs in accordance with the Fair Labor Standards Act was in good faith and that the defendant has reasonable grounds for believing its acts were not a violation of the Fair Labor Standards Act. Plaintiffs cross-appeal from such determination.
>
> "During the period with which we are here concerned defendant was engaged in the meat packing business. Its plant in Chicago, Illinois, covered an area of four city blocks. It purchased livestock in various parts of the United States for shipment to its Chicago plant. The meat products and by-products produced at Chicago were shipped by defendant throughout the United States. A total of four thousand persons were employed at the Chicago plant, which included 276 employed in the mechanical division, whose duties were to maintain and repair buildings, machinery, and equipment at the plant. The personnel in this division were blacksmiths, carpenters, tinsmiths, electricians, painters, millwrights, steamfitters, elevator repair men, and others in like vocation. The shops comprising the mechanical division were grouped together within a space of 900 feet. Each of the 149

plaintiffs herein was employed in the mechanical division. Most of them spent a large portion of their time working outside of their assigned shops.

"Substantial evidence supports the trial court's findings that the scheduled working hours for employees of the mechanical division while working the day shift were from 8:00 A. M. to noon and from 12:30 P. M. to 4:30 P. M.; that defendant required all employees of the mechanical division, including plaintiffs, to be dressed in their working clothes prior to punching the time clock and to punch the clock before commencing work each morning; that defendant promulgated a rule requiring employees of the mechanical division to report to the shops to which they were assigned, dressed for work and ready to commence work, at 7:55 A. M.; that this rule was enforced by the supervisory personnel of the mechanical division and that employees were further appraised and reminded of the rule by signs prominently posted in various places, such as the dressing rooms and near the time clocks; that plaintiffs commenced their usual daily activities at 7:55 A. M., at which time they received instructions when necessary from the supervisory personnel, obtained or removed their tools from tool chests and cabinets, and, when their presence was required in other portions of the plant, left their shops carrying their tools or supplies to go where their work was assigned.

A contract between the certified union and the defendant was in effect which provided for a basic workday of eight hours and a basic workweek for forty hours, and that workers should be paid at one and one-half times their regular rate for all overtime hours. It is admitted that when the defendant computed the compensation due each plaintiff it did not include the period from 7:55 A. M. to 8:00 A. M. as part of the workday. This action was brought to recover overtime compensation for that five minute period for those days on which the time cards disclosed plaintiffs punched the time clock at or before 7:55 A. M."

The Court of Appeals overruled defendant's Portal Act defenses and held that the additional five minutes worked each day pursuant to company rule was compensable under the express provisions of a written contract, and consequently recovery was authorized by Section 2(a) of the Portal-to-Portal Act, 61 Stat. 85, 29 U. S. C. § 252(a). It denied recovery, however, solely because it considered the time to be *de minimis* under *Anderson* v. *Mt. Clemens Pottery Company*, 328 U. S. 680.

After plaintiffs had filed a petition for rehearing, the Administrator of the Wage and Hour Division of the Department of Labor sought (T. 562) and obtained (T. 564) leave to file a memorandum in support of the petition. The petition for rehearing was denied on March 9, 1949 (T. 565).

Statutes Involved.

The statutes involved are Section 7 of the Fair Labor Standards Act, 52 Stat. 1063, 29 U. S. C. § 207, which requires an employer to pay his employees time and one-half for all hours worked over forty in any workweek; Section 16(b), of that Act, 52 Stat. 1069, 29 U. S. C. § 216 (b), which gives an employee a cause of action for unpaid minimum wages and an additional equal amount as liquidated damages; Section 11 of the Portal-to-Portal Act, 61 Stat. 89, 29 U. S. C. § 261, which permits a court to withhold liquidated damages, or to award an amount less than the amount of the unpaid minimum wages where the employer shows that he acted in good faith and had reasonable grounds for believing that he was not violating the Fair Labor Standards Act; Section 2(a) of the Portal Act, 61 Stat. 85, 29 U. S. C. § 252(c) which provides that no employer shall be subject to liability under the Fair Labor Standards Act unless the activity was compensable by the express provisions of a contract, or by custom or

practice; and Section 2(c) of the Portal Act, 61 Stat. 85, 29 U. S. C. § 252(c) the relevant portions of which are as follows:

> "(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of sub-sections (a) and (b) of this section."

Questions Presented.

1. May an employer who regularly and continuously requires its employees to work five minutes additional each day invoke, as a defense to an employees' action under the Fair Labor Standards Act, the *maxim de minimis non curat lex* where the time and activities involved are compensable by express agreement and therefore compensable under the Portal-to-Portal Act?

2. Where the defendant offers no evidence tending to show that it acted in good faith and had reasonable grounds for believing that its act or omission was not a violation of the Fair Labor Standards Act, may the trial court deny liquidated damages under Section 11 of the Portal-to-Portal Act?

Reasons Relied Upon for Granting the Writ of Certiorari.

1. The Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court.

2. The Court of Appeals has decided a federal question (the scope of the *de minimis* maxim) in a way probably in conflict with applicable decisions of this Court.

The decision of the Court of Appeals:

(a) would permit employers throughout industry to deny compensation for time worked pursuant to agreement, contrary to the express language and purposes of the Fair Labor Standards Act and the Portal-to-Portal Act.

(b) runs counter to established industrial practices, would undermine existing collective bargaining agreements and encourage disputes leading to industrial strife.

(c) distorts the decision of the court in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, to the financial gain of employers and to the financial detriment of employees.

(d) is the first decision of its kind anywhere in the country and unless reversed by this court, will be followed by other employers throughout industry resulting in extensive and burdensome litigation.

Conclusion.

For the above reasons, more fully supported in the attached brief, it is submitted that the petition for the writ of certiorari should be granted.

Respectfully submitted,

ELSON AND COTTON,
By ALEX ELSON.

ALEX ELSON,
WILLARD J. LASSERS,
Of Counsel.

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OCTOBER TERM, A. D. 1948.

No. .....

JOHN W. FRANK, ET AL.,
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BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

Summary of Argument.

The opinion of the court below is a judicial determination that an employer may, contrary to the provisions of the Fair Labor Standards Act, require his employees to work five minutes additional each day, although such time and the activities involved are compensable by express agreement and are not therefore barred by the Portal-to-Portal Act.

It reaches this result in the face of the clear language of Section 2 (c) of the Portal Act, 61 Stat. 85, 29 U. S. C. § 252 (c), which requires that *all* time compensable by express contract be included in determining the time during which an employee was employed, for purposes of the Wage

and Hour Law. It supports its position by applying the *de minimis* maxim on the authority of *Anderson* v. *Mt. Clemens Pottery Company,* 328 U. S. 680, in spite of the fact that there this Court was speaking with reference to odd fragments of time spent walking and doing miscellaneous preliminary jobs interspersed with personal activities unrelated to employment. The amount of these odd fragments of time, moreover, in that case, varied from employee to employee, and even as to the same employee the amount varied from day to day.

It is our firm belief that the opinion of the court not only works a hardship on the plaintiffs and confers a windfall upon the defendant, but also has serious adverse implications upon employees throughout industry. As a result of the court's opinion, there is nothing to prevent the defendant from reinstating at once its rule requiring employees to report to work at 7:55 A. M. Not only is this true, but every employer would find support in the opinion for promulgating a similar rule.

We submit that the opinion of the Court of Appeals overlooks the following important points:

(1) Section 2 (c) of the Portal Act forbids the application of the *de minimis* maxim to periods of time, however short, which are compensable by express agreement.

(2) The *de minimis* maxim is inapplicable to fixed and certain periods of time which the employee is regularly and consistently required to work.

(3) Industry does not regard a five-minute period as *de minimis.*

(4) The applicability of the *de minimis* maxim should be determined by the objectives of the statute and the character of the violation involved.

In addition, the Court of Appeals, because of its conclusions, did not consider the following:

(5) Petitioners should recover liquidated damages in an amount equal to the amount of unpaid overtime compensation found to be due them.

(a) There is no evidence in the record tending to show that respondent acted in good faith and had reasonable grounds for believing that it was not violating the Fair Labor Standards Act.

(b) In the absence of evidence tending to show that respondent acted in good faith and had reasonable grounds for believing that its act or omission was not a violation of the Fair Labor Standards Act, petitioners should recover liquidated damages.

Specification of Errors.

1. The Court of Appeals erred in failing to permit recovery under Section 2 (c) of the Portal-to-Portal Act, 61 Stat. 85, 29 U. S. C. § 252 (c), for periods of time made compensable under the express provisions of a written contract.

2. The Court of Appeals erred in holding the *de minimis* maxim applicable to fixed and certain periods of time which the employee was regularly and consistently required to work under rules systematically enforced by the employer.

3. The Court of Appeals erred in failing to direct the District Court to award petitioners double damages since respondent offered no evidence tending to show that it acted in good faith and had reasonable grounds for believing that its act or omission was not a violation of the Fair Labor Standards Act.

ARGUMENT.

I.

Section 2(c) of the Portal Act Forbids the Application of the De Minimis Maxim to Periods of Time, However Short, Which Are Compensable by Express Agreement.

The Court of Appeals stated in its opinion that it is "bound by the finding of the district court that the plaintiffs were required to work five minutes in excess of the eight regular hours on each of the days indicated by the time cards in evidence (as compiled in the stipulation)". The court also concluded that the activities of the plaintiffs were covered by an express provision of a written contract. These conclusions clearly distinguish this case from the case of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, and all of the other cases cited by the court applying the *de minimis* maxim. In the *Mt. Clemens* case and in the other cases none of the activities for which compensation was sought were compensable by express agreement or by custom or practice.

Consequently Section 2 (c) of the Portal Act, 29 U. S. C. § 252 (c) which was irrelevant to these other cases (or was not yet enacted) must be considered here and compels a different result. The section provides:

> "In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, *in determining the time* for which an employer employed an employee there shall be counted *all that time,* but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section." (Italics ours.)

It is to be noted that this language, applicable to claims pending at the time the Act became law, clearly and unequivocally provides that in determining the time for which an employer employed an employee *all* of the time compensable under the Act shall be counted.[1]

Moreover, Section 2(c) would have no purpose unless it is construed to mean that the *de minimis* doctrine shall not apply to actions based on contract or custom. Sections 2(a) and (b) immediately preceding, exempt an employer from liability except for claims based on contract or custom. If we construe Section 2(c) to mean simply the converse of Sections 2(a) and (b), namely, that where a claim is based on contract or custom, the employer is liable, Section 2(c) becomes useless surplusage.

Legislative history supports our position: when Senator Cooper, one of the sponsors of the new legislation, was asked during the Senate debates whether the problem could not be handled legislatively by making the *de minimis* rule apply to all time less than a fixed amount, he replied that a *de minimis* rule, even though of a fixed nature, would create considerable confusion for employer and employee, thereby increasing, instead of decreasing the amount of litigation (93 Cong. Rec. 2300). It was the desire to establish a rule of general application for determination of time worked which would remove all uncertainty and would not be dependent upon divergent judicial interpretations. Sponsors of the new legislation were fully aware of Judge Picard's dismissal of the *Mt. Clements* case under the *de*

1. The Administrator of the Wage and Hour Division, in commenting upon Section 2(c), quotes the section, italicizing the words "all" and "only", and adds:

> "* * * the statute expressly provides that *all* * * * time [compensable by contract or custom] shall be counted in computing hours worked." (The italics were added by the Administrator.) Interpretative Bulletin: "General statement as to the effect of the Portal-to-Portal Act," p. 33, 29 CFR Sec. 790.24(a), FR, Nov. 18, 1947.

minimis doctrine, but they pointed out that the holding there was applicable only to that particular case and did not offer a general solution to the problem (Senate Report No. 48, 80th Cong., 1st sess. (1947), pp. 42-43; 93 Cong. Rec. 2295).

Moreover, in the conference report, the managers on the part of the House make the following statement with reference to Section 2(c):

> "This provision, which is in the nature of a clarifying statement, is for two purposes, (1) to emphasize that employers are not relieved from liability for the payment of minimum wages and overtime compensation under the three Acts for *any* time during which the employee engaged in activities compensable under the rules above stated, and (2) * * *." (Italics ours.) (Rept. 326, 80th Cong., 1st Sess., p. 10.)

It is obvious that Congress intended by the Portal Act to reach claims similar to those involved in the *Mt. Clemens* case and the other cases cited by the Court of Appeals, but did not intend to deny to employees the right to recover for time worked for an employer which the employer had expressly agreed to pay for.

The rationale underlying the position that the *de minimis* maxim is inapplicable to agreed compensable time is simple. One should not be relieved of a contract obligation particularly where it is supported by a remedial statute. When the employer agrees to pay for time worked the failure to pay for such time is no different than the payment of an hourly rate less than an agreed hourly rate.

It is clear from the Congressional debates of the Portal-to-Portal Act that one of the principal reasons that led Congress to pass the Act was to remove the possibility of windfall recovery to employees for activities which were not compensable by agreement or by custom. The wind-

fall aspect of recovery is completely eliminated where there is an express agreement to compensate for the time. If, however, recovery is denied where there is an express agreement, the employer receives a windfall.

To deny the employees the right to recover because the time involved is small, is manifestly unjust. The *de minimis* maxim was developed by courts of equity. Like all such maxims it should be used to do equity and not to bring about an inequitable result.

II.

The De Minimis Maxim Is Inapplicable to Fixed and Certain Periods of Time, Which the Employee Is Regularly and Consistently Required to Work.

In its opinion the Court of Appeals upheld the trial court's finding that the plaintiffs were required to commence their usual activities five minutes before the time defendant computed the start of their working day for payroll purposes. This five minute period was fixed and certain throughout the four-year period involved. The amount due each of the plaintiffs under the judgment of the trial court varied only to the extent that the plaintiffs were employed for varying periods of time during the four-year period, but for all plaintiffs there was no question that during the time they were employed they each were required to work a fixed and certain period of five minutes a day. This circumstance provides a clear basis of distinction between this case and the cases cited in the opinion for applying the *de minimis* maxim.

In *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, and the other cases cited by the court, the time involved was not fixed, was uncertain and irregular, and differed with each of the employees involved. There, this Court

stated the facts relevant to this particular issue as follows (p. 689):

> "The employees . . . . . were required to be ready for work at their benches at the scheduled starting times. They were given 14-minute periods in which to punch the time clocks, walk to the places of work and prepare for productive labors. But there was no requirement that an employee check in or be on the premises at any particular time during that 14-minute interval. As noted by the District Court, there was no evidence 'that if the employee didn't get there by 14 minutes to seven he was fired and there is much testimony to prove that stragglers came in as late as one minute to seven'."

From this statement of facts, it would appear that the claim being made was for such time within the 14-minute period as the employee could show was devoted to walking to the place of work or engaging in preparatory activities. So far as requirements of the employer were concerned, an employee could report as late as one minute prior to the scheduled working time. In order to establish a claim in the *Mt. Clemens* case, it was necessary to engage in an elaborate pacing off of distances and the use of stop watches, tape measures, and other mechanical devices. Even after all these linear and time measurements were made, the result was an approximation at best.

The other cases relied upon by the Court of Appeals (T. 559) may be distinguished in a similar fashion: *McIntyre* v. *Joseph E. Seagram and Sons Co., Inc.*, 72 F. Supp. 336, involved a claim for walking and clothes changing time. *Lasater* v. *Hercules Powder Co.*, 73 F. Supp. 264, concerned travel time from the plant gate to the work place and clothes changing time. *Timmons* v. *Wagoner County Coal Co.*, 13 Labor Cases Par. 64,006, was another travel time case while *McComb* v. *C. A. Swanson and Sons*, 77 F. Supp. 716, was another clothes

changing case. *Tully* v. *Joshua Hendy Corp.*, 13 Labor Cases Par. 64,696, related to work during the lunch period.

The irregularity and uncertainty of the amount of time involved, apart from the fact that there was no agreement to compensate for such time, afforded some justification for the application of the *de minimis* maxim in the cases cited. Since the employees kept no record, the courts were forced to rely upon stop-watches and mechanical measuring devices to approximate retrospectively the time involved. These methods converted the judicial process into a guessing game. But no such considerations enter this case. Here the trial court did not have to make any guesses. The time involved was fixed, certain and recorded.

The court, in its opinion, states that each situation presented must be examined in the light of what is "substantial" and "reasonable" in view of all the factors present (T. 558). It then refers to two factors: first, that not more than five minutes a day is involved (T. 558); second, that "checking in at the time clock, the receiving of instructions from supervising personnel, the obtaining of tools from tool chests and cabinets, and the walking to the place plaintiffs were required to be, are similar to the preliminary activities which were held governed by *de minimis* in the *Mt. Clemens* case" (T. 558). With reference to the second factor, it should be pointed out that the opinion is inconsistent. The employees in this case are maintenance employees. In the *Mt. Clemens* case the employees were production workers. Earlier in its opinion the court points up this distinction. The opinion states: "The court also found that the plaintiffs were required by the rule of the company to be dressed for work and punched in by 7:55 A. M. Much of the work that they did immediately after punching in, such as receiving instructions, drawing materials, going from the shop to

the place of work, and carrying tools, was the same type of activity that they carried on from time to time throughout the day. It must be kept in mind that these plaintiffs were maintenance men who might remain on one job all day, or who might go from place to place in the plant and participate in half a dozen jobs on any given day" (T. 556).

The distinction between fixed and regular activities and irregular or occasional activities has already been adopted by this Court in determining whether an employer's interstate business is adequate to bring it under the Fair Labor Standards Act. In *Mabee* v. *White Plains Publishing Company*, 327 U. S. 178, an action by employees for overtime compensation, this Court held that the statute applied to the publisher of a daily newspaper where only one-half of one percent of its circulation was out of state. It specifically rejected a *de minimis* argument on the ground that "while sporadic or occasional shipment of insubstantial amounts of goods" might be insufficient to impose coverage, "there is no warrant for assuming that regular shipments in commerce are to be included or excluded dependent on their size" (327 U. S. 178, 181). A similar distinction should be made concerning work time questions. When the violation is regular and certain and recurs throughout the period in question, there is no reason for the application of the *de minimis* maxim. The employer knows what his obligation is, the employee can prove his claim, and the court is relieved of the burden of guessing the amount due.

III.

Industry Does Not Regard a Five Minute Period as De Minimis.

The industrial world, unlike the business and professional world, lives rigidly by the clock, not the calendar. Employees are customarily paid by the hour. They punch in and punch out at a time clock. Where an employee is absent for a few hours of a day he is docked; where he is asked to work overtime, he receives additional compensation. The employer expects its men to start work promptly at the scheduled time; the employees expect to quit promptly at the scheduled time. In general, the industrial worker's pay starts when he starts to work, and stops promptly when he stops.

Because tardiness interferes with efficient production, it is sharply penalized. The record shows that where an employee punched in after 7:55 A. M. and before 8:00 A. M. he was reprimanded or docked up to half an hour (T. 73, 83, 103-4, 137, 175). It is not uncommon for collective bargaining agreements to provide that an employee should be docked if he is two or three minutes late to work, and to provide increasing penalties for repeaters.

BNA Collective Bargaining Negotiations and Contracts, p. 57:721.

Collective Bargaining Agreements, Bulletin No. 908-8 (1948), U. S. Department of Labor, p. 73.

Labor Coordinator (Research Institute of America) J-5, 962.

Union Contracts and Collective Bargaining (Labor Equipment-Prentice Hall) par. 53,484.

It might be noted, also, that where tardiness is not covered by collective bargaining, it is common for the company rules to provide for docking for the minutes thus lost even if the employee is only one or two minutes late. See *Studies in Personnel Policy*, No. 95 (October 1948), National Industrial Conference Board, Inc., pp. 23-24.

In fact the importance to the respondent of the five minute period is already shown by the aggressive measures which it took to enforce it (T. 73, 83, 103-4, 137, 175). It should not be heard to say now that its rule may be dismissed as *de minimis*.

IV.

The Applicability of the De Minimis Maxim Should Be Determined by the Objectives of the Statute and the Character of the Violation Involved.

We submit that, in determining the *de minimis* question, it is vital that the nature of the violation be evaluated in terms of the objectives of the Fair Labor Standards Act.

One of those objectives, as stated in the Fair Labor Standards Act itself and in the decisions of this Court, is to prevent the producer of goods manufactured under substandard working conditions from having an unfair competitive advantage over goods produced in conformity with the Act.

> § 2(a) of the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. § 202(a).
> *United States* v. *Darby*, 312 U. S. 100, 122.

Here the defendant promulgated and enforced a five minute rule. It did so because it was to its advantage to do so. By violating the Act it gained a competitive

advantage over other complying employers. How can it be said that the advantage so gained is *de minimis?* It pocketed in excess of $14,000 so far as the 149 plaintiffs are concerned and twice that sum if we were to include all of the 276 employees of the mechanical department. While the amount involved is not great to a large employer, it is still a tidy sum.

The Court of Appeals, however, instead of following the basic purposes of the Act, held the case to be governed by the *Mt. Clemens* decision, and also referred to the smallness of the amounts sought to be recovered. It points out that thirty-three plaintiffs were awarded less than $50.00 each and sixty-nine plaintiffs less than $100.00 each, and that one plaintiff was awarded as little as $5.05. The variation in amounts awarded each of the plaintiffs is explained by the circumstances that they were employed for varying lengths of time within the suit period of approximately four years. Thus the plaintiff awarded $5.05 was employed for only 32 days during the suit period, whereas the plaintiff awarded $168.53 was employed for four years. The fallacy of using the amount awarded each plaintiff as the test is best demonstrated by assuming that the five minute rule was invoked by the defendant against all of the four thousand employees in its Chicago plant for the suit period. In such a situation the amounts awarded each plaintiff would vary within a range similar to this case but the total amount due would be, assuming a similar incidence of turnover, a huge sum.

As a result of the opinion the defendant would be legally safe in restoring the five minute rule and making it applicable this time to all of its many thousands of employees in its Chicago plant and other plants throughout the country. The restoration of the five minute rule under such circumstance will result in the defendant reap-

ing a financial gain of windfall proportions to the competitive disadvantage of other employers contrary to the purpose of the statute as well as to the financial status of the individual employees involved. Looking at the nature of the violation here involved, in terms of purposes of the statute, it cannot be said that the *de minimis* maxim is applicable to it.

V.

Petitioners Should Recover Liquidated Damages in an Amount Equal to the Amount of Unpaid Overtime Compensation Found to Be Due Them.

Because of the conclusions of the Court of Appeals on the other issues in the case, it did not consider this issue.

(a) There Is No Evidence in the Record Tending to Show That Respondent Acted in Good Faith and Had Reasonable Grounds for Believing That It Was Not Violating the Fair Labor Standards Act.

The trial court concluded as a matter of law that defendant's failure to compensate plaintiffs in accordance with the Fair Labor Standards Act was in good faith and that it had reasonable grounds for believing that its act or omission was not a violation of the Act (Conclusion of Law 7, T. 523). Accordingly, it denied liquidated damages.

The record, however, is devoid of evidence to show that defendant acted in good faith or had reasonable grounds for believing that its act or omission was not a violation of the Fair Labor Standards Act. In fact defendant did not even propose such a finding of fact (R. 503-505).

(b) In the Absence of Evidence Tending to Show That Respondent Acted in Good Faith and Had Reasonable Grounds for Believing That Its Act or Omission Was Not a Violation of the Fair Labor Standards Act, Petitioners Should Recover Liquidated Damages.

Section 16(b) of the Fair Labor Standards Act, 52 Stat. 1069, 29 U. S. C. Sec. 216(b), provides:

> "Any employer who violates the provisions of section 6 [relating to minimum wages] or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages * * *."

After the passage of the Act in 1938, the question arose whether the courts were at liberty to deny or to limit the award of liquidated damages once the amount of the unpaid compensation had been determined, or whether the statute made mandatory an award of liquidated damages equal to the amount of the unpaid compensation.

The latter view, that an award of liquidated damages was mandatory, was made the law of the land by a unanimous decision of this Court in *Overnight Motor Transportation Company* v. *Missel,* 316 U. S. 572 (1942).

When the portal pay controversy arose, there was sentiment in Congress for modification of the rule of the *Missel* case. Accordingly, two sections designed to modify this rule were incorporated in the Portal-to-Portal Act, 61 Stat. 84, 29 U. S. C. § 251. One was Section 9, 29 U. S. C. § 259, which provides that no liability whatever shall be imposed under the Fair Labor Standards Act where the employer pleads and proves that he acted in good faith in accordance with a rule or regulation of any agency of the United States. That section is not involved

here. The other section, which is relevant here, is section 11, 29 U. S. C. § 261, which reads as follows:

> "Sec. 11. LIQUIDATED DAMAGES.—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16(b) of such act."

On the record before the Court, petitioners contend that it was error for the trial court and the Court of Appeals not to award liquidated damages in an amount equal to the amount of the unpaid overtime compensation found to be due them. Section 11 provides that the court may in its sound discretion refuse to award the full sum due as liquidated damages only where the employer "shows to the satisfaction of the court" that his act or omission was "in good faith" and that he had "reasonable grounds" for believing it not to be a violation of the Fair Labor Standards Act. It is clear that the burden of proof is upon the employer with respect to each of these statutory requirements if he is to be relieved from paying liquidated damages.

It is equally clear that if he fails to prove each of the two essential facts, the court has no discretion, but must award the full measure of liquidated damages.

That the burden of proof is on the employer seeking relief under Section 11 appears so patent from its language that it seems necessary to say little more.

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The Administrator of the Wage and Hour Division of the Department of Labor in an official Interpretative Bulletin likewise has construed Section 11 as placing the burden of proving good faith on the employer. Section 790.22(b) of Interpretative Bulletin on the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938, 29 Code Fed. Reg. § 790.22(b) (Supp. 1947) provides:[1]

> "The conditions prescribed as prerequisites to such an exercise of discretion by the court are two: (1) The employer must show to the satisfaction of the court that the act or omission giving rise to such action was in good faith; and (2) he must show also, to the satisfaction of the court, that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act. If these conditions are met by the employer against whom the suit is brought, the court is permitted, but not required, in its sound discretion to reduce or eliminate the liquidated damages which would otherwise be required in any judgment against the employer. This may be done in any action brought under section 16(b) of the Fair Labor Standards Act, regardless of whether the action was instituted prior to or on or after May 14, 1947, and regardless of when the employees activities on which it is based were engaged in. *If, however, the employer does not show to the satisfaction of the court that he has met the two conditions mentioned above, the court is given no discretion by the statute, and it continues to be the duty of the court to award liquidated damages*" (Italics added).

The Portal-to-Portal Act is relatively new. There appears to be only one federal appellate decision in point,

1. In *Skidmore* v. *Swift and Company*, 323 U. S. 134 (1944), this Court referred to the interpretative bulletins of the Administrator as constituting a "body of experience and informed judgment to which courts and litigants may properly look for guidance."

Day & Zimmerman v. *Reid*, 168 Fed. (2d) 356 (C. C. A. 8th, 1948). There the Circuit Court of Appeals for the Eighth Circuit, on facts somewhat analogous to those in the case at bar, ruled that where the defendant had failed to convince the court of its good faith, liquidated damages would be allowed.

Conclusion.

If the opinion stands it will be an open invitation to employers throughout industry to promulgate five minute rules similar to that of the defendant. This result was not intended by Congress, is not authorized by the language of the Fair Labor Standards Act and is contrary to the express language of the Portal-to-Portal Act. The opinion relies upon the equitable maxim *de minimis non curat lex*. For the reasons that the claim involved in this case is compensable by express agreement, is fixed and certain, and is substantial in terms of the purposes of the statute involved, we contend that the maxim *de minimis* is inapplicable. We request that the petition for the writ of certiorari be granted.

Respectfully submitted,

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